N. J., I. F. 1191–1200 Issued January, 1931

United States Department of Agriculture

FOOD AND DRUG ADMINISTRATION

NOTICES OF JUDGMENT UNDER THE INSECTICIDE ACT

[Given pursuant to section 4 of the insecticide act]

1191–1200

[Approved by the Secretary of Agriculture, Washington, D. C., January 6, 1931]

1191. Alleged misbranding of Lee's lice killer. U. S. v. 63 Quarts, et al., of Lee's Lice Killer. Tried to the court. Judgment for claimant. (I. & F. No. 1456. S. No. 182.)

This department having examined samples of Lee's lice killer, intended for use to control and destroy lice and other vermin of poultry and having reached the conclusion that the article was unable to accomplish certain results claimed in the labeling, the Secretary of Agriculture reported the facts to the United States attorney for the Western District of Missouri.

On August 27, 1927, the said United States attorney filed in the District Court of the United States aforesaid a libel praying seizure and condemnation of 63 quart cans, 41 one-half-gallon cans, and 15 gallon cans of Lee's lice killer. It was alleged in the libel that the article had been shipped by the Geo. H. Lee Co., Omaha Nebr., in various consignments on or about January 13, March 15, April 7, May 2, May 25, July 1, and July 5, 1927, respectively, from the State of Nebraska into the State of Missouri; that having been so transported, it remained in the original unbroken packages at Kansas City, Mo., and that it was a misbranded insecticide within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was misbranded in that the statements, "Lee's Lice Killer is intended principally for use about the poultry houses, for chickens, keeping rid of mites * * * also the various forms of feather lice and body lice that habitually remain upon the chickens. See other part of this label for directions. For Body Lice on Fowls. Apply Lee's Lice Killer liberally to the roosts a half hour before chickens go to roost at night, to get a wide evaporating surface for killing body lice it is necessary to arrange a 12 or 14 inch board directly under and close up against the roost. Apply Lee's Lice Killer to both boards and roost daily for a short time, then once a month regularly. The roost itself, should be a 2 x 3 or a 2 x 4 with top edge rounded," borne on the label affixed to each of the cans containing the article, together with the statement, "Lee's Lice Killer. We are free from lice," used in connection with a picture of chickens, borne on the said label, were false and misleading, and by reason of the said statements the article was labeled and branded so as to deceive and mislead the purchaser, since it was alleged that the article, when used as directed, was not an effective remedy against chicken lice, was not an effective remedy against body lice on fowls, and would not free chickens from lice.

On November 4, 1927, the Geo. H. Lee Co., Omaha, Nebr., entered an appearance and filed claim and answer denying that the product was misbranded, and for further answer set up as res judicata a verdict of "not guilty" returned by the jury July 3, 1924, to an information filed against the Geo. H. Lee Co., in the District Court of the United States for the District of Nebraska charging misbranding of an interstate shipment of the product involved in this action. (I. & F., N. J. No. 1052.) A motion to strike that portion of the answer relating to the plea of res judicata was filed by the Government. On April 23, 1928, the Government's motion to strike was sustained by the court in the following memorandum opinion (Otis, *D. J.*): "This case is a libel instituted by the Government against a certain quantity of a substance known commercially as

Lee's lice killer, which the Government seeks to confiscate on the ground of misbranding. The answer filed by the Geo. H. Lee Co., of Omaha, which is charged with having consigned and shipped the substance referred to from Omaha to Kansas City, Mo., sets up in the fifth paragraph thereof that the question as to whether the substance referred to was misbranded is res adjudicata. In support of this plea it is alleged that in July, 1917, in a District Court of the United States for the district of Nebraska the Geo. H. Lee Co., was charged in a criminal information with having unlawfully shipped a certain number of packages of the same kind of alleged misbranded insecticide and that upon the trial of that case the defendant was acquitted.

"I think the motion to strike the plea of res adjudicata from the answer should be sustained.

"Notwithstanding the allegation of the answer that the only issue involved in the criminal case was whether the insecticide there under consideration was misbranded, obviously that was not the only issue raised by the pleadings. The pleadings were the information and the plea of 'not guilty.' The verdict of 'not guilty' might have been based on a determination of other questions than the question whether the particular quantity of insecticide involved in that case was or was not misbranded. It might appear, of course, from the whole record if that were pleaded in the present answer that other possible questions that could have been raised in the criminal case were eliminated by the testimony for the defendant, but that record has not been pleaded nor any part of it indicating such elimination of other issues. It must clearly appear from a plea of res adjudicata in order that it may be good that the identical issue was previously determined.

"But the most forceful reason for sustaining the motion to strike out is this: If there was but one issue actually involved in the criminal trial. that issue was not as to whether any substance made after the formula of Lee's lice killer was misbranded, but was as to whether the particular substance, the particular quantity of that insecticide referred to in the information as having been shipped from Omaha to Salt Lake City was misbranded. It does not follow that because that issue was determined favorably to the defendant in that case that a wholly different quantity of the same brand of insecticide may not be misbranded. It was not the formula which was on trial in the criminal case. It was a specific shipment. It was not the formula which was adjudged good by the verdict in that case. At most it was that particular shipment which was so adjudged.

"The cases which are cited by the defendant in its brief are cases in which the identical thing was involved in the criminal and civil proceeding. The case referred to as a leading case on the subject is Coffey *v.* United States, 116 U. S. 436. There, among other things, the defendant was tried for the unlawful distillation of a certain quantity of brandy and was acquitted. The Government then attempted to confiscate the identical brandy on the ground that it had been unlawfully distilled by the defendant. The Supreme Court held that the acquittal was res adjudicata of the question as to whether the brandy was unlawfully distilled and that, therefore, the civil action could not be maintained. That case, however, is not in point here. Nor does it seem to me that any of the other cases cited are more in point.

"An analogous case would be this: The Government institutes a proceeding to confiscate a certain quantity of alleged intoxicating liquor. It is charged that this liquor contains more than one-half of one per cent of alcohol by volume and that it is possessed for beverage purposes. It is a trademarked beverage made in accordance with a certain formula. A defense of res adjudicata is set up. In support of that it is alleged that in a criminal proceeding several years before the same person whose property is now sought to be confiscated was tried for the unlawful sale of intoxicating liquor, to wit, for the unlawful sale of a pint bottle of the same beverage made in accordance with the same formula and bearing the same trade mark. It is set up that in that criminal trial the defendant was acquitted and that that acquittal resolved the issue as to whether the beverage in question did contain more than one-half of one per cent of alcohol by volume and was, therefore, intoxicating liquor. The plea of res adjudicata clearly would not be good and that for the same reason as here. In the criminal trial the formula was not the matter in issue. What was in issue (and that was not the only issue) was whether the specific bottle of alleged intoxicating liquor was or was not within the prohibition of the law.

"The motion to strike out is sustained."

The case came on for trial before the court on November 20, 1928. After the submission of evidence on behalf of the Government and the claimant, the court handed down the following opinion sustaining the claimant (Otis, *D. J.*):

"The action brought in this case is a libel action, entitled United States of America vs. 63 Quart Cans, 41 Half-gallon cans, and 15 Gallon Cans, more or less, of Lee's Lice Killer. It is alleged in the petition,—if it is to be called a petition; I guess it is not properly called a petition—that the Geo. H. Lee Co., manufacturer of Lee's lice killer, had made a shipment of the 63 quart cans, and so forth, which are the subject of this libel, and that they were falsely labeled—misbranded under a violation of the law, and that they were misbranded, as I gathered it from the petition, in several particulars. It is alleged that there appears upon the label of the cans in question a statement to the effect that Lee's lice killer is intended principally for use about poultry houses to get rid of mites and also the various form of feather lice and body lice upon the body of chickens. It is alleged that those statements are false and misleading, and it is also alleged that this statement appears on the label, which is misleading: 'For body lice on fowls apply Lee's Lice Killer liberally to the roosts a half hour before chickens go to roost at night to get a wide evaporating surface. For killing body lice it is necessary to arrange a 12 or 14 inch board directly under and close up against the roost. Apply Lee's Lice Killer to both board and roost daily for a short time, then once a month regularly,' and then giving the dimensions for the roost. Then it is further alleged that in connection with the picture that appears upon the can there is the statement that 'Lee's Lice Killer—We are Free from Lice.' And it is alleged that that is a false and misleading statement.

"Such are the statements which it is alleged are false and misleading—statements appearing upon the label or as a part of the label upon the can in question.

"The burden of proof is upon the Government to establish by the greater weight or preponderance of the credible testimony in the case that those statements appearing upon the labels—and while I have not looked at the exhibit, I assume that the statements do appear upon the label—the burden of proof is upon the Government to prove that they are false and misleading.

"I think the Government has not sustained that burden. I see nothing appearing in any of those statements alleged to be false and misleading, which could be construed as a guaranty of absolute efficiency, that it is a perfect and unfailing remedy. And yet all that has been proved by the Government is that when tests were made—and only two were made—the remedy was not completely effective. It only succeeded in ridding the fowls of from 50 to 75 per cent of the lice with which they were infested. It would seem to me—although I know nothing about chickens—they are very desirable under certain circumstances when properly prepared—it would seem to me that the remedy which in two applications disposed of 50 or 75 per cent of the lice, is certainly not entirely valueless, and not entirely without effectiveness; but it would seem to be quite effective. And apparently from the testimony and from the statements contained on the labels referred to in the petition, the experiments referred to in the testimony did not conform in all respects to the instructions which were to be followed in applying this remedy. That is to say, the instructions required that the remedy shall be applied monthly, and the remedy in these experiments was only applied on two occasions over a period of several days. If there was no testimony other than the testimony introduced by the Government, the court would not be justified in finding that it had been proved that statements made and appearing on the labels were false and misleading. It is a matter of common knowledge that no remedy, whether designed for human beings or for animal life, is absolutely effective. The statements appearing upon the labels as they are set out are not exaggerated claims of absolute effectiveness. They seem to be moderate statements of what the remedy is intended to do.

"I say, if there had been no evidence except that offered by the Government I would not be justified in finding that these statements were false and misleading. But there was other evidence, that offered by the defendant, which is to be considered, and which when considered with the evidence offered by the plaintiff, leaves no other possible conclusion than that the burden of proof required by law has not been sustained, and that the issues in this case must be

found against the Government and—I don't know that I could say in favor of the 'defendant'—I guess there is no defendant in a case of this kind, as there had been no formal intervenor.

"The finding is against the libelant and in favor of the owner of the goods sought to be condemned, on the ground that there has been no proof that the statements complained of were false and misleading."

Counsel for the Government thereupon made the following statement to the court: "May I say this to your Honor: That is not the Government's case. When Mr. Crane and Mr. Gaines came to me, at the time I received a letter from the department, they assured me they were not going to contest the case on the facts, and that all the Government needed to do was to establish a prima facie case and that it would not be rebutted; that they were going to rely wholly upon the introduction of proof of res judicata; and for that reason the Government followed the agreement and only had one witness, as they said 'If you will bring one witness who says this product will not do what it says it will do, we will not contest that proposition,'" to which statement the court responded: "Of course, I know nothing about any previous private understanding between counsel. I must decide the case upon what is presented to me."

On November 20, 1928, a decree was entered by the court ordering that the case be dismissed and the product returned to the claimant.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1192. Alleged misbranding of Lee's lice killer. U. S. v. 65 1/2 Dozen Quart Size, et al., of Lee's Lice Killer. Tried to the District Court. Judgment for the Government. Appeal to Circuit Court of Appeals. Reversed. (I. & F. No. 1455. S. No. 179.)

This department having examined samples of Lee's lice killer, intended for use to control and destroy lice and other vermin on poultry, and having reached the conclusion that the article was unable to accomplish certain of the results claimed in the label, the Secretary of Agriculture reported the facts to the United States attorney for the Southern District of California.

On August 30, 1927, the said United States attorney filed in the District Court of the United States for the district aforesaid a libel and on September 8, 1927, an amended libel praying seizure and condemnation of 65 3/12 dozen quart-sized, 63 1/12 dozen half-gallon-sized, 64 1/12 dozen gallon-sized and 3 1/6 dozen 5-gallon-sized cans of Lee's lice killer. It was alleged in the libel as amended that the article had been shipped by the Geo. H. Lee Co., Omaha, Nebr., in part on or about June 26, 1926, and in part on or about February 21, 1927, from Nebraska into the State of California, that having been so transported it remained in the original unbroken packages at Los Angeles, Calif., and that it was a misbranded insecticide within the meaning of the insecticide act of 1910.

Misbranding of the article was alleged in the libel as amended for the reason that the following statements, "Lee's Lice Killer is intended principally for use about the poultry house, for chickens, keeping rid of mites * * * also the various forms of feather lice and body lice that habitually remain upon the chickens. See other part of this label for directions. For Body Lice on Fowls—Apply Lee's Lice Killer liberally to the roosts a half hour before chickens go to roost at night, to get a wide evaporating surface for killing body lice it is necessary to arrange a 12 or 14 inch board directly under and close up against the roost. Apply Lee's Lice Killer to both boards and roost daily for a short time, then once a month regularly. The roost itself, should be a 2 x 3 or 2 x 4 with top edge, rounded," borne on the labels affixed to the cans containing the article, together with the statement, "Lee's Lice Killer. We are free from lice," used in connection with a picture of chickens, borne on the said label, were false and misleading, and by reason of said statements the article was labeled so as to deceive and mislead the purchaser, since it was alleged that the article, when used as directed, was not an effective remedy against chicken lice, was not an effective remedy against body lice on fowls, and would not free chickens from lice.

On November 26, 1927, the Geo. H. Lee Co., Omaha, Nebr., entered an appearance as claimant and filed answer to the libel, denying the misbranding charge and setting up as res judicata in bar of the action a verdict of "not guilty" returned in the District Court of Nebraska to a criminal information filed against the Geo. H. Lee Co. (I. & F., N. J. No. 1052). A motion by the Government to strike out the portion of the answer relating to the plea of res judicata was denied by the court, but subsequently allowed without an opinion.

On February 5, 1929, the claimant filed an amended answer setting forth the defenses contained in the original answer and for further defense, and as

res judicata in bar of the action, judgment in the District Court for the Western District of Missouri in favor of the claimant in a seizure action, (I. & F., N. J. No. 1191) which involved, as did also the criminal information in the District of Nebraska, interstate shipments of Lee's lice killer.

On April 11, 1929, a jury having been waived, the case came on for trial before the court. Evidence was introduced on behalf of the Government and claimant, and arguments were submitted by counsel. The court announced that the case would be taken under advisement and ordered that briefs on the law and facts be submitted.

On June 24, 1929, a minute order was entered by the court in favor of the Government. On December 27, 1929, the court returned as its conclusions of law that the product was misbranded; that it was subject to condemnation, confiscation, and destruction; and that the proceeding was not barred by the judgment in the Western District of Missouri. Judgment was entered ordering that the product be destroyed by the United States marshal.

The claimant having perfected an appeal, the case came on before the United States Circuit Court of Appeals for the Ninth Circuit on bill of exceptions and assignment of errors. On June 9, 1930, the Circuit Court of Appeals handed down the following opinion reversing the judgment of the District Court (Dietrich, Cir. J.):

"For more than twenty years the appellant, Geo. H. Lee Co., has been and it now is engaged in the manufacture of a preparation known as Lee's lice killer, which it sells with the representation that it will destroy poultry lice. In 1926 and 1927 it shipped on consignment certain cans of the preparation from its principal place of business at Omaha. Nebr., to the Germain Seed & Plant Co., in Los Angeles, Calif. Upon the assumption that the cans were misbranded this suit was commenced, in September, 1927, for their forfeiture pursuant to the provisions of sections 8 and 10 of the insecticide act of 1910 (36 Stat. 333, 334; 7 U. S. C. A. 49, 50, 52), and the cans were seized by the United States marshal. Responding to process, the appellant, as owner, appeared and, after much delay, the reasons for which are not disclosed, issue was joined, on February 5, 1929, upon the filing by it of a supplemental and amended answer to an amended libel. In this pleading it admitted the shipment and all averments of the libel other than those charging that the brands or labels were false and misleading. Affirmatively it set up that the libelant was judiciously estopped by reason of a similar proceeding culminating in a decree upon the merits in its favor in the United States District Court for the Western District of Missouri, on November 20, 1928; and thus is presented the controlling issue in the case. The facts are not in dispute and may be stated, substantially in the language of the findings, as follows:

"On or about the 27th day of August, 1927, a libel was filed in the District Court of the United States in the Western District of Missouri by the United States against 63 quart cans, 41 half-gallon cans, and 15 gallon cans, more or less, of Lee's lice killer, wherein the charge was made that said Lee's lice killer, in the labeling thereof, was misbranded within the meaning of the insecticide act of 1910. The appellant herein entered an answer in response to the libel and trial was had thereon to the merits in the month of November, 1928, resulting in a decree in favor of appellant herein. In that case, as here, appellant admitted the shipments and sales and labeling and the only issue of fact joined therein was whether or not the preparation known as Lee's lice killer was misbranded. The labels on the cans in that case bore statements, designs, and devices in the same manner and form as those on the cans involved in this case and the preparation or insecticide involved therein was manufactured from the same chemical formula as the preparation herein involved, and that all cans containing Lee's lice killer, including the cans seized and involved in that action contained said preparation known as Lee's lice killer, and said preparation of Lee's lice killer consists of substantially the same chemical constituents in the same proportion. In short, it is to be taken as true that the preparation, and the branding thereof when put on the market, are substantially identical in the two cases and both shipments are upon the same footing in contemplation of law. In the former case decree was for the Lee Co., and here against it, upon the same issue. In both cases the parties were the same, in both cases there was a single issue and in the former case that issue was decided upon the merits. In both cases in their representations both labels or brands were the same and the preparations to which they related were identical in character so that the only difference between the two suits is that they relate to two different shipments.

"Even were it to be held that technical identity in cause of action fails because the two proceedings relate to two different lots of the same compound and to labels or brands physically different though in form and meaning the same, it still remains true that the only real issue decided in the former proceeding is the one real underlying issue in the instant proceeding, that is, the relation of a certain brand to a certain preparation, common to both suits. The case, therefore, is clearly within the narrowest application of the principle of judicial estoppel. In Mitchell *v.* First National Bank, 180 U. S. 471, the Supreme Court said: 'We are of the opinion that the bank was concluded by the judgment in the State Court. In the recent case of Southern P. R. Co. *v.* United States, 168 U. S. 1, 48, 42 L. Ed. 355, 376, 18 Sup. Ct. Rep. 18, 27, we said, after an extended examination of the adjudged cases, that "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.'"

"Manifestly the purpose of this principle or rule would be frustrated if the view for which the Government contends were to be sustained. If the Government is not bound by an adverse judgment neither is the appellant. Hence, without modifying its formula or changing its labels it could, notwithstanding the decree herein, ship its preparation into other territory, and indeed into the same territory, with the hope of a more favorable result elsewhere or next time should the Government bring other libels. And instead of 'peace and repose of society' the result would be chaos and endless turmoil. By appellee reliance is had on United States *v.* Stone & Downer Co. 274 U. S. 225. But the court was there reviewing a judgment of the Court of Customs Appeals exercising jurisdiction in a special field of litigation quasi administrative, and it was accordingly held not only that the Customs Court was within the exercise of the power conferred upon it by Congress in declining, because of the distinctive character of the controversies coming before it, to recognize the rule of res adjudicata, but that such recognition would be unwise. We find little analogy between that case and this and in it no warrant for extending, to a familiar class of litigation, a ruling limited in its reasoning to a new and distinctive field. Nor is it thought that anything we said in Aycock *v.* O'Brien, 28 Fed. (2d) 817, lends support to appellee's contention. Reversed."

ARTHUR M. HYDE, *Secretary of Agriculture.*

1193. Misbranding of Apex moth cake. U. S. v. 2 Gross Packages of Apex Moth Cake. Default decree of condemnation, forfeiture, and destruction. (I. & F. No. 1511. S. No. 196.)

Samples of a product known as Apex moth cake, having been found to be labeled with certain claims relative to its efficacy in the control, prevention, and destruction of moths, which it was incapable of fulfilling, the Secretary of Agriculture reported the matter to the United States attorney for the Southern District of California.

On October 14, 1929, the said United States attorney filed in the District Court of the United States aforesaid a libel praying seizure and condemnation of 2 gross packages of Apex moth cake. It was alleged in the libel that the article had been shipped by the Apex Laboratories (Inc.), from Chicago, Ill., on or about July 16, 1929, and had been transported from the State of Illinois into the State of California, and that it was a misbranded insecticide within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was misbranded in that the statements, to wit, "Apex Moth Cake. Directions: Tear off airtight wrapper over front by drawing pin point or other sharp edge around inside of front rim, and place cake where moth protection is desired. In closets, hang high, above

garments, and keep door closed as much as possible. In large closets or rooms, or if stronger fumes are desired, remove front entirely. Clothes that have been subjected to 'Apex' vapors can be worn immediately as 'Apex' leaves no odor. Apex Moth Cake evaporates slowly in air, giving off a heavy invisible vapor that kills and repels all stages of moth life. * * * It * * * purifies * * * Apex Moth Cake will give continuous protection for several months, depending on size of closet, temperature, ventilation, etc. When entirely evaporated replace at once with a new Apex Moth cake * * * Particularly suited for clothes closets, lockers, chests, trunks, drawers, etc. * * * Apex Moth Cake rids your clothes and home of moths," borne on the label affixed to the cakes of the article, were false and misleading, and by reason of the said statements the article was labeled and branded so as to deceive and mislead the purchaser, since the said article, when used as directed, would not be an effective control for moths in large closets or rooms, would not kill and repel all stages of moth life, would not purify, would not be an effective control for moths in all clothes closets and lockers, and would not be an effective control for moths under all conditions.

On July 11, 1930, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1194. Adulteration and misbranding of dry powdered arsenate of calcium. U. S. v. 55 drums, et al., of Dry Powdered Arsenate of Calcium. Default decree of condemnation, forfeiture, and destruction. (I. & F. 1524. S. No. 211.)

Samples of the dry powdered arsenate of calcium from the herein-described interstate shipments having been found to contain less calcium arsenate and more inert ingredients than represented on the label, the Secretary of Agriculture reported the facts to the United States attorney for the Eastern District of Virginia.

On June 9, 1930, the said United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 55 drums and eight hundred fifty 4-pound bags of dry powdered arsenate of calcium. It was alleged in the libel that the article had been shipped by the Sherwin-Williams Co., Bound Brook, N. J., into the State of Virginia, on or about January 25, 1930, that having been so transported it remained in the original unbroken packages at Richmond, Va., and that it was an adulterated and misbranded insecticide within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was adulterated in that the statements, to wit, (drums) "70% Active Ingredients: Calcium Arsenate, 30% Inert Ingredients, Total Arsenic (expressed as percentum of Metallic Arsenic) not less than 26.1%; equivalent to 40% Arsenic Oxide," and (bags) "Active Ingredients: Calcium Arsenate 70%, Inert Ingredients 30%, Total Arsenic (expressed as percentum of Metallic Arsenic) not less than 26.1%; equivalent to 40% Arsenic Oxide," borne on the labels affixed to the drums and bags containing the article represented that its standard and quality were such that it contained calcium arsenate in the proportion of not less than 70 per cent, contained total arsenic, expressed as percentum of metallic arsenic, in the proportion of not less than 26.1 per cent, contained arsenic oxide in the proportion of not less than 40 per cent, and contained inert ingredients, namely, substances that do not prevent, destroy, repel, or mitigate insects, in the proportion of not more than 30 per cent, whereas the strength and purity of the article fell below the professed standard and quality under which it was sold, in that it contained less calcium arsenate, less arsenic, expressed as percentum of metallic arsenic, less arsenic oxide, and more inert ingredients than so represented.

Misbranding was alleged for the reason that the above-quoted statements borne on the said drums and bags were false and misleading, since the said article contained less than 70 per cent of calcium arsenate, less than 26.1 per cent of total arsenic, expressed as per centum of metallic arsenic, less than 40 per cent of arsenic oxide, and more than 30 per cent of inert ingredients.

On July 31, 1930, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1195. Misbranding of Parafume. U. S. v. 122 Cartons of Parafume. Default decree of condemnation, forfeiture, and destruction. (I. & F. No. 1515. S. No. 203.)

Examination of samples of a product known as Parafume from the hereindescribed interstate shipment having shown that the labels bore claims relative to its insecticidal and deodorant properties which it was incapable of fulfilling, the Secretary of Agriculture reported the facts to the United States attorney for the Western District of Texas.

On December 21, 1929, the said United States attorney filed in the District Court of the United States aforesaid a libel praying seizure and condemnation of 122 cartons of Parafume. It was alleged in the libel that the article had been shipped by the Crystal Products Co., New York, N. Y., on or about October 16, 1929, into the State of Texas, that having been so transported it remained in the original unbroken packages at Waco, Tex., and that it was a misbranded insecticide within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was misbranded in that the statements, to wit, "To eliminate all insects tear wrapper, exposing about one-half inch square of the Parafume. A block placed in drawer or closet will protect materials from moths. Placed over window or door will prevent insects entering because the heavy gas fumes form a protective screen. For kitchen use place several blocks on the floor of the room infested and note promptness with which vermin disappear. Placed in piano, will prevent * * * moths from attacking felts. * * * As a bathroom deodorant a block of your favorite scent secretes a fragrance and removes unpleasant odors." borne on the label, affixed to each of the blocks of the article, and the statements, to wit, "Parafume kills moths, mosquitoes, flies, roaches, ants, and other insects. * * * Clears rooms of smoke and bad odors," borne on the cartons containing the article, were false and misleading, and by reason of said statements the said article was labeled so as to deceive and mislead the purchaser, in that they respresented that the said article, when used as directed, would eliminate all insects, would protect all materials from moths, would prevent insects from entering a room, and drive all vermin from the kitchen, would prevent moths from attacking felt in the piano, would kill moths, mosquitoes, flies, roaches, ants, and other insects, and would remove all unpleasant odors from the bathroom and would clear rooms of smoke and all bad odors," whereas the said article, when used as directed, would not be effective for the above purposes.

On June 26, 1930, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1196. Misbranding and alleged adulteration of MacGregor's ant food. U. S. v. 16 Cans, et al., of MacGregor's Ant Food. Product found misbranded. Default decree of condemnation, forfeiture, and destruction. (I. & F. No. 1527. S. No. 216.)

Samples of MacGregor's ant food having been found to bear in the labeling certain claims regarding its insecticidal properties which it was unable to fulfill, and a portion having been found to contain less borax and more inert matter than declared on the labels, the Secretary of Agriculture reported the facts to the United States attorney for the Eastern District of Pennsylvania.

On August 13, 1930, the said United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of sixteen 1-pound cans and eleven 5-pound cans of MacGregor's ant food. It was alleged in the libel that the article had been shipped by MacGregor's Salairacine & Ant Food, from Princeton, N. J., in interstate commerce into the State of Pennsylvania, the 1-pound cans on or about April 29, 1930, and the 5-pound cans on or about June 25, 1930, that having been so transported it remained unsold in the original unbroken packages at Philadelphia, Pa., and that the portion of the article contained in the 1-pound cans was adulterated and misbranded, and that the remainder was misbranded in violation of the insecticide act of 1910.

Adulteration of the portion of the product contained in the 1-pound cans was alleged in the libel for the reason that the statements, "Active: Paris Green 2%, Borax 8%, Inert 90%," borne on the label affixed to the can containing the article, represented that its standard and quality were such that it contained inert matter, namely, substances that do not prevent, destroy, repel, or

mitigate insects, in the proportion of not more than 90 per cent; whereas its strength and purity fell below the standard and quality under which it was sold, in that it contained less than 8 per cent of borax and more than 90 per cent of inert matter.

Misbranding of the portion contained in the 1-pound cans was alleged for the reason that the above-quoted statements borne on the can labels were false and misleading, and by reason of the said statements the article was labeled so as to deceive and mislead the purchaser, in that they represented that the said article contained not less than 8 per cent of borax and not more than 90 per cent of inert matter; whereas it contained less than 8 per cent of borax and more than 90 per cent of inert matter.

Misbranding was alleged with respect to both lots of the article for the reason that the statements: "MacGregor's Ant Food * * * An Amazing Discovery for Killing Ants, Cock Roaches, Woodlice, Snails and certain other Insects * * * Directions. Dust the Food freely about the places where the Ants, etc., are noticed. (a) For use on Golf courses: Dust Ant Food lightly over the surface of the greens. (b) For Garden use: Dust over the surface of the soil near the plants. (c) For Greenhouse use: Dust on the soil in the benches also under the benches," borne on the labels affixed to the cans containing the article, were false and misleading, and by reason of the said statements the article was labeled so as to deceive and mislead the purchaser, in that they represented that the said article, when used as directed, would be an effective control of ants, cockroaches, wood lice and snails; whereas it would not

On September 15, 1930, no claimant having appeared for the property, judgment was entered finding the product misbranded, and it was ordered by the court that the said product be condemned, forfeited, and destroyed.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1197. Adulteration and misbranding of Jersey dry mix and sulphur lead dust. U. S. v. Henry A. Bester, jr., and J. Alvey Long (Hagerstown Spray Material Co.). Pleas of guilty. Fine, $75 and costs. (I. & F. No. 1500. Dom. Nos. 03388, 03389, 03390.)

Examination was made by this department of samples of Jersey dry mix and sulphur lead dust, intended for use in the control of insects and certain fungi, which showed that they contained substances which had no value for such purposes and which were not declared on the labels. The Jersey dry mix was also found to contain less sulphur than labeled and the sulphur lead dust was found to contain less sulphur and less lead arsenate than labeled. The labels of the said sulphur lead dust failed to bear a statement of the total amount of arsenic, expressed as per centum of metallic arsenic, and of arsenic in water-soluble form, expressed as per centum of metallic arsenic, contained in the article.

On September 15, 1930, the United States attorney for the District of Maryland, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for the district aforesaid an information against Henry A. Bester, jr., and J. Alvey Long, trading as the Hagerstown Spray Material Co., alleging shipment by said defendants in violation of the insecticide act of 1910, on or about May 16 and June 19, 1928, from the State of Maryland into the State of West Virginia of quantities of the said Jersey dry mix and sulphur lead dust, which were adulterated and misbranded.

It was alleged in the information that the articles were adulterated in that the statements "Accurate Percentage Thoroughly Mixed 64% 'Superfine' Sulphur 32% Chem. Hydrated Lime 4% Casein Spreader," with respect to the Jersey dry mix, and "Accurate Percentage Thoroughly Mixed 85% 'Superfine' Sulphur and 15% Arsenate of Lead," with respect to the said sulphur lead dust, borne on the labels, represented that the former contained not less than 64 per cent of sulphur and that the remaining ingredients were hydrated lime and casein only and that the latter contained not less than 85 per cent of sulphur, and not less than 15 per cent of arsenate of lead; whereas the strength and purity of the articles fell below the professed standard and quality under which they were sold, in that the said Jersey dry mix contained less than 64 per cent of sulphur and contained, in addition to the declared said ingredients, carbonated lime and silicious material, and the said sulphur lead dust contained less than 85 per cent of sulphur and less than 15 per cent of arsenate of lead, and did not consist of sulphur and lead arsenate only, but other substances, silicious material and calcium compounds, had been substituted in part for sulphur and arsenate of lead.

Misbranding was alleged for the reason that the above-quoted statements borne on the labels were false and misleading, and by reason of the said statements the articles were labeled so as to deceive and mislead the purchaser.

Misbranding of the sulphur lead dust was alleged for the further reason that it contained arsenic and the total amount of arsenic present, expressed as per centum of metallic arsenic, was not stated on the label; and for the further reason that it contained arsenic in water-soluble form and the amount of arsenic in water-soluble form, expressed as per centum of metallic arsenic was not stated on the label.

Misbranding was alleged for the further reason that the articles consisted partially of inert substances, namely, substances that do not prevent, destroy, repel, or mitigate insects or fungi, and the names and percentage amounts of each and every one of the said inert substances so present therein were not stated plainly and correctly on the tags affixed to the sacks containing the said articles; nor, in lieu thereof, were the names and percentage amounts of each and every substance or ingredient of the articles having insecticidal or fungicidal properties, and the total percentage of the inert substances or ingredients so present therein, stated plainly and correctly on the said tags.

On September 15, 1930, the defendants entered pleas of guilty to the information, and the court imposed a fine of $75 and costs.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1198. Adulteration and misbranding of Beetle Mort. U. S. v. 20 Cases of Beetle Mort. Product adjudged adulterated and misbranded and ordered released under bond. (I. & F. No. 1523. S. No. 210.)

An examination of samples of a product labeled "Beetle Mort" intended for use in the control of insects, having shown that the article contained more water-soluble arsenic (expressed as metallic) than declared on the label and that it would be injurious to certain vegetation when used as directed, the Secretary of Agriculture reported the matter to the United States attorney for the Eastern District of South Carolina.

On May 17, 1930, the said United States attorney filed in the District Court of the United States for the district aforesaid, a libel praying seizure and condemnation of 20 cases of Beetle Mort. It was alleged in the libel that the article had been shipped on or about March 14, 1930, by the Lucas Kil-Tone Co., Vineland, N. J., from the State of New Jersey into the State of South Carolina, that having been so transported it remained in the original unbroken packages at Charleston, S. C., and that it was an adulterated and misbranded insecticide, other than Paris green and lead arsenate, within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was adulterated in that it was intended for use on vegetation, and when used on certain vegetation as directed by the label it would be injurious to the foliage thereof.

Misbranding was alleged for the reason that the statements "Water Soluble Arsenic (expressed as Metallic) not more than 1.00%. The seller guarantees the material sold to be true to label, if labeled. For killing * * * other leaf-eating insects. To be applied as a dust * * * for * * * melons. * * * Directions for use against most leaf-eating insects affecting * * * Melons, * * * Use six to eight pounds per acre," borne on the label affixed to the packages containing the article, were false and misleading, and by reason of the said statements the article was labeled and branded so as to deceive and mislead the purchaser, in that they represented that the article contained water-soluble arsenic (expressed as metallic) in the proportion of not more than 1 per cent, that the said article was true to label and that it could be used safely on the foliage of melons; whereas said article contained water-soluble arsenic (expressed as metallic) in a proportion much greater than 1 per cent, it was not true to label, and when used as directed on the foliage of melons would prove seriously injurious to such foliage.

On July 22, 1930, the Lucas Kil-Tone Co., Vineland, N. J., having appeared as claimant for the property, a decree was entered adjudging the product adulterated and misbranded, and it was ordered by the court that the said product be released to the claimant upon payment of costs and the execution of a bond in the sum of $250, conditioned in part that it be made to conform in all respects to the insecticide act of 1910.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1199. Misbranding of the insecticide Banem. U. S. v. 16 Boxes of The Insecticide Banem. Default decree of condemnation and destruction. (I. & F. No. 1526. S. No. 215.)

An examination of a product known as the insecticide Banem, intended for use in the control of insects, having shown that the labels bore claims of insecticidal properties that the article did not possess, the Secretary of Agriculture reported the matter to the United States attorney for the District of Columbia.

On or about August 4, 1930, the said United States attorney filed in the Supreme Court of the District of Columbia, holding a District Court, a libel praying seizure and condemnation of 16 boxes of the said the insecticide Banem. It was alleged in the libel that the article had been shipped on or about May 20, 1930, by the B & B Chemical Corporation, from New York, N. Y., into the District of Columbia, and having been so shipped it remained unsold in the original unbroken packages at Washington, D. C., and that it was a misbranded insecticide within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was misbranded in that the statements, to wit, "The Insecticide Banem * * * For use in closets, trunks, drawers. Cut open on inscribed square, place disk wherever protection is needed; if stronger fumes are desired, cut opening larger," borne on the label affixed to the packages containing the article, were false and misleading, and by reason of the said statements the article was labeled so as to deceive and mislead the purchaser, in that they represented that the said article, when used as directed, would be effective as an insecticide under all the conditions indicated on the said label; whereas the article, when used as directed, would not be effective as an insecticide under all the conditions indicated on the label. Misbranding was alleged for the further reason that the following statements, to wit, "Banem Kills! Moths—Flies Mosquitoes Roaches—Bugs, etc. A Fragrant Deodorant and Effective Insensate for insects. Contains Paradichlorobenzene—Appproved by the Bureau of Entomology and the Department of Agriculture, U. S. A.," borne on the display card accompanying the article, were false and misleading, and by reason of the said statements the article was labeled so as to deceive and mislead the purchaser, in that they represented that the said article, when used as directed, would be an effective control for moths, flies, mosquitoes, roaches, bugs, and all other insects, and that paradichlorobenzene had been approved by the Bureau of Entomology of this department as an effective control for moths, flies, mosquitoes, roaches, bugs, and all other insects; whereas the article, when used as directed, would not be an effective control for moths, flies, mosquitoes, roaches, bugs, and all other insects, and paradichlorobenzene had not been approved by the Bureau of Entomology of this department as an effective control for moths, under the conditions indicated in the labeling, and had not been approved as an effective control for flies, mosquitoes, roaches, bugs, and all other insects.

On November 17, 1930, no claimant having appeared for the property, judgment of condemnation was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

1200. Misbranding of Pest-Go moth paddles. U. S. v. 1 Gross Pest-Go Moth paddles. Default decree of condemnation, forfeiture, and destruction. (I. & F. No. 1525. S. No. 214.)

Examination of samples of Pest-Go moth paddles from the herein-described interstate shipment having shown that the product was not effective to control moths and all insects and was not a disinfectant, the Secretary of Agriculture reported the matter to the United States attorney for the District of Oregon.

On or about July 8, 1930, the said United States attorney filed in the District Court of the United States for the district aforesaid, a libel praying seizure and condemnation of one gross of Pest-Go moth paddles, remaining in the original unbroken packages at Portland, Oreg. It was alleged in the libel that the article had been shipped by the Pest-Go Co., Seattle, Wash., on or about March 8, 1930, and that having been so shipped it remained in the original unbroken packages at Portland, Oreg., and that it was a misbranded insecticide and a fungicide within the meaning of the insecticide act of 1910.

It was alleged in the libel that the article was misbranded in that the following statements, "Pest-Go. Out go the Moths when I come in * * * Simply hang or place Pest-Go Paddle in your clothes closets * * * dressers

or wherever you keep your valuable furs, woolens, clothing, blankets, etc.; in your overstuffed furniture; in the piano; * * * In the process of evaporation Pest-Go releases fumes that mean death to Mr. Moth if he doesn't get out. It is, however, the moth grub or larvae that is destructive, and as he can not get away from the penetrating fumes of Pest-Go, he becomes stupefied and finally destroyed," borne on each of the said paddles, and the statements, "Unexcelled for the Prevention of Moths and Insects Pest-Go Retains its activity for months * * * Pest-Go Out Go The Moths When I come in. To the Dealer: Keep this carton where your customers can see it. They will want this new and convenient method of suspending a constant disinfectant," borne on the carton containing the article, were false and misleading, and by reason of the said statement the article was labeled so as to deceive and mislead the purchaser, in that they represented that said article, when used as directed, would be an effective control for moths, would be an effective control for all insects and for moths under all conditions, and that the article was a disinfectant; whereas the said article, when used as directed, would not be an effective control for moths, would not be an effective control for all insects and for moths under all conditions, and was not a disinfectant.

On August 14, 1930, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

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